FILED
MAR 29 1991
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(3)

No. 90-1298

IN THE

Supreme Court of the United States

October Term, 1990

AMER AL-ZUBAIDI,

Petitioner,

v.

M. A. IJAZ, *et al.*,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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This reply brief addresses arguments first raised in the brief in opposition to the petition for writ of certiorari. Sup. Ct. R. 15.6.

I. ARGUMENT

A. THIS CASE PRESENTS THE QUESTION OF CAUSATION IN MIXED MOTIVES CASES

It is not the petitioner's intention to have the trial evidence reassessed by this Court; that evidence was considered and weighed by the jury.[1] Rather, it is petitioner's intention to have this Court recognize, as the Fourth Circuit majority refused to do, that, once the plaintiff has shown that his constitutionally protected conduct was a substantial or motivating factor in the adverse treatment he received, the "but for" test applicable to mixed motives cases requires defendants

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[1]. Unlike the respondent, the petitioner believes that the jury, not the judge, was "the decision maker" in this case. See, Brief of Respondent at 11. The jury reviewed "the full evidentiary record", id., and found specifically that petitioner's termination was caused by respondent's unlawful actions and that petitioner could have completed his program `but for' those actions. (A-23).

to present actual evidence, that the same decision would have been made absent the unlawful animus.

The respondent ignores, as he must, the role of the various committees in causing petitioner's termination. The respondent relies instead on Dr. Gilmer's review of Al-Zubaidi's file, a review which the jury obviously rejected, of a file whose multiple level hearsay could not withstand cross-examination or jury scrutiny.

In relying on Gilmer's review, the respondent would reduce the "but for" test to a mechanical exercise in which, despite its burden of proof on the issue, see, Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.E.2d 268 (1989), a defendant's recitation of the proffered nondiscriminatory basis of its action would be beyond scrutiny by the fact

finder and would immunize it from liability. The respondent would thus not only reduce a defendant's burden on this issue to a simple burden of production, such as exists to rebut a prima facie showing under Title VII, see, McDonnell Douglas Corporation v. Green, 411 U.S. 792, 935 Ct. 1817, 36 L.Ed. 2d 668 (1973), but would also raise the fact of production to an absolute, unrebuttable defense.[2] This result is directly contrary to this Court's admonition in Price Waterhouse that "proving `that the same decision would have been

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[2]. Only by reducing the defendant's burden to one of mere production can the respondent in this case possibly say with a straight face that his version of petitioner's record was "uncontroverted". Brief of Respondent at 7. The only thing about petitioner's file left uncontroverted was the fact that certain documents were in his file; the contents of those documents were thoroughly discredited. (A-47-53).

justified...is not the same as proving that the same decision would have been made.'" 109 S.Ct. at 1791, quoting Givhan v. Western Line Consolidated School Dist., 439 U.S. 410, 416, 99 S.Ct. 693, 58 L.Ed. 2d 619 (1979).

In fact, the district court never relied on Gilmer's review of petitioner's record in granting judgment NOV. The district court focused instead on its belief that "there was no evidence that the other members of the plaintiff's doctoral committee were influenced by any religious discrimination on the part of Dr. Ijaz." (A-44-45). The district court found that the committee vote, not Gilmer's review, provided the respondent with his liability shield. (A-45).

Similarly, the Court of Appeals majority relied on its belief that "the record indicates that the graduate

committee's [emphasis added] decision to recommend the termination of Al-Zubaidi was based on Al-Zubaidi's entire file," referencing only passingly Gilmer's "[attempt] to gather a sample of opinion on Al-Zubaidi outside of his final Ph.D. committee ...." (A-20).

Thus, it is only in respondent's revisionist version of the litigation that Gilmer's alleged review of the entire record is elevated to a position of immutability. And it is only by deflecting attention from the fact that both courts below relied on the committee decisions to preclude liability that the respondent is able to pretend that this case does not, in fact, present the substantial question as to whether such decisions do provide a shield from such liability in a mixed motives case. Both courts below relied specifically on the

committee defense to justify their decisions, respondent's suggestions to the contrary notwithstanding.

B. THERE EXISTS A CONFLICT AMONG THE CIRCUITS

The respondent attempts to rationalize the Ninth Circuit's decision in Haimowitz v. Univ. of Nevada, 579 F.2d 526 (1978) by sleight of hand. He argues that, consistent with Haimowitz, petitioner did receive "the opportunity to show the impact of an advisory committee on a decision," but that the courts found the evidence lacking. Brief of Respondent at 9.

Of course, that is not the opportunity which Haimowitz mandates. The question under Haimowitz is not whether the committee vote effected the result, but whether the unlawfully motivated

actions of the advisor effected the committee vote. It is that opportunity which the courts below denied after the fact.

The district court specifically held that petitioner's proof was lacking not because he had failed to show the impact of the committee decision on the result, but because he had not shown that the other committee members had shared respondent's animus. (A-45). As the dissent below noted, relying on Haimowitz, "it is simply incorrect to say as a matter of law that Ijaz counted as only one vote ... or that [his] influence ended with the single vote he cast." (A-39).

C. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT

One need look no further than respondent's own argument to find the inconsistency between the result below and

the decisions of this Court in Price Waterhouse and Mt. Healthy City School Dist., Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Mt. Healthy and Price Waterhouse clearly establish that the defendant has the burden of proving that, even in the absence of the unlawful considerations, the same decision would have been made. Mt. Healthy, 429 U.S. at 287; Price Waterhouse, 109 S.Ct. at 1790. Yet the respondent is forced to argue that the petitioner was afforded "the opportunity to show the impact of an advisory committee on a decision," Brief of Respondent at 9, and that evidence as to this issue was "lacking to support a finding in [petitioner's] favor". Id. Were the majority opinion below truly consistent with this Court's decisions in Mt. Healthy and Price Waterhouse, the

respondent would not be forced to contradict the clear burden of proof set out in those cases. Indeed, the Fourth Circuit's majority holding recognizes that Gilmer's decision was made at least in part as a result of the thesis committee recommendation (A-20-21), yet ignores this Court's clear holding that a defendant in a mixed-motives case "may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason." Price Waterhouse, 109 S.Ct. at 1791.

II. CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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